

STATE OF TENNESSEE

Office of the Attorney General



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TN REGULATORY AUTHORITY
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Reply to:
Consumer Advocate and Protection Division
Post Office Box 20207
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March 12, 2004

Chairman Deborah Taylor Tate
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37243

RE: IMPLEMENTATION OF THE FEDERAL COMMUNICATIONS COMMISSION'S
TRIENNIAL REVIEW ORDER- 9 MONTH PROCEEDING-SWITCHING
Docket 03-00491

Dear Chairman Tate:

Enclosed is an original and thirteen copies of the Surrebuttal Testimony of Dr. Steve Brown for the Consumer Advocate and Protection Division of the Office of the Attorney General in the above matter. We request that these documents be filed with the TRA in this docket. Please be advised that all parties of record have been served copies of these documents. If you have any questions, kindly contact me at (615) 741-7833. Thank you very much.

Sincerely,

A handwritten signature in dark ink, appearing to read "Joe Shirley".

Joe Shirley
Assistant Attorney General


Before the
TENNESSEE REGULATORY AUTHORITY

**IN RE: IMPLEMENTATION OF THE FEDERAL COMMUNICATIONS
COMMISSION'S TRIENNIAL REVIEW ORDER- 9 MONTH PROCEEDING-
SWITCHING**


DOCKET NO. 03-00491

AFFIDAVIT

I, Steve Brown, for the Consumer Advocate and Protection Division of the Attorney General's Office, hereby certify that the attached Surrebuttal Testimony represents my opinion in the above-referenced case and the opinion of the Consumer Advocate and Protection Division.


STEVE BROWN
Economist

Sworn to and subscribed before me
this 12th day of March, 2004.


NOTARY PUBLIC

My commission expires: 7/21/2007

I. Introduction

Q_1. Please state your name.

A_1. Steve Brown.

Q_2. What is your job title and where do you work?

A_2. I am an Economist in the Consumer Advocate and Protection Division (CAPD), Office of the Attorney General.

Q_3. Are you the same Steve Brown who gave direct and rebuttal testimony representing the opinion of the CAPD in this proceeding of the Tennessee Regulatory Authority (TRA)?

A_3. Yes, I am.

Q_4. What testimony are you giving now?

A_4. The testimony I am giving now is surrebuttal testimony. It responds to the incumbent's rebuttal of my direct testimony in this proceeding, which is the TRA's proceeding to implement the Federal Communications Commission's (FCC) Triennial Review Order (TRO) in Tennessee.

Q_5. Whose rebuttal testimony is your surrebuttal testimony addressing?

A_5. My surrebuttal testimony addresses the rebuttal testimony of Ms. Kathy Blake, BellSouth's Director of Policy Implementation.

Q_6. When was Ms. Blake's rebuttal testimony filed?

1 **A_6.** Ms. Blake's rebuttal testimony in this
2 proceeding was filed on February 27, 2004.
3

4 **II. Incumbent's Conclusion Regarding**
5 **CAPD's Direct Testimony**

6
7
8 **Q_7.** What does Ms. Blake conclude regarding the
9 CAPD's direct testimony in the instant case,
10 TRA Docket No. 03-00491?
11

12 **A_7.** In her rebuttal testimony at page 34 lines 6 to
13 12 Ms. Blake concludes:
14

15 *"The TRA has also recognized the importance of*
16 *fostering negotiated contractual rates for business*
17 *customers consistent with the specific guidance of the*
18 *Tennessee General Assembly's enactment of Tennessee*
19 *Public Chapter 41. Specifically, in the May 5, 2003*
20 *Report and Recommendation of the Hearing Officer in*
21 *[TRA] Docket No. 00-00702... the Hearing Officer*
22 *described the substantial review by the TRA of the same*
23 *issues raised by Dr. Brown. In short, there is no new*
24 *angle on termination liability that is either relevant to the*
25 *impairment analysis or that has not been considered*
26 *numerous times (and rejected) by the TRA."*
27
28

29 **III. CAPD's Surrebuttal of Incumbent's**
30 **Rebuttal**

31
32
33 **Q_8.** What is your opinion of Ms. Blake's conclusion?
34

35 **A_8.** My opinion is that Ms. Blake's conclusion is
36 wrong. My direct testimony does not address the
37 legality of term offerings, as Ms. Blake's

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1 rebuttal testimony implies. My direct testimony
2 is about the adverse economic impact of the
3 term liability in those contracts. Furthermore,
4 the FCC has a "new angle" on termination
5 liability and a new opinion never before
6 considered by the TRA.
7
8

9 **III. A. - TRA Hearing Officer's Report Of**
10 **May 2003 Recommended A Policy**
11 **Towards The Incumbent's Termination**
12 **Liability That Is Different From The**
13 **FCC's Policy Of August 2003**
14

15
16 **Q_9.** What evidence supports your opinion that the
17 TRA has never before considered the FCC's
18 policy towards termination liability?
19

20
21 **A_9.** The evidence supporting my opinion stems from
22 Ms. Blake's reliance on the TRA Hearing
23 Officer's report. Ms. Blake brings the document
24 into this proceeding's record and thus shows
25 the large divide between the opinion expressed
26 in TRA Hearing Officer's report and the FCC's
27 opinion. The FCC's opinion on the economic
28 effect of termination liability was issued in
29 August 2003 and thus postdates by three months
30 the Hearing Officer's report of May 2003.
31

32 Therefore, the TRA has not had an opportunity
33 to examine whether the policy recommended in
34 the Hearing Officer's report is consistent with
35 the FCC's regulatory policy.
36

1 Q_10. In your opinion is it necessary for the TRA's
2 policy to be consistent with the FCC's?
3

4 A_10. Yes. In my opinion it is necessary for the TRA
5 and the FCC to have consistent regulatory
6 policy.
7

8 Q_11. Why should the TRA's policy be consistent with
9 the FCC's policy?
10

11 A_11. In my opinion the TRA should be consistent with
12 the FCC because only one set of regulatory
13 rules should govern the competitive contest
14 between the incumbent and the CLECs. Right now
15 the state and federal regulatory agencies have
16 very different policies towards the incumbent's
17 termination charges. Until the policies are
18 aligned, there will be two different regulatory
19 rules applying to the incumbent's termination
20 charge.
21

22 The FCC warns that termination liability is an
23 economic barrier suppressing the incumbent's
24 competitors if the liability prevents
25 BellSouth's customers from becoming customers
26 of the Competitive Local Exchange Carrier
27 (CLEC).
28

29 The FCC says in the TRO at para. 75 and the
30 accompanying footnote 252:
31

32 *"Depending on the circumstances barrier to entry can*
33 *come from...long-term contracts...An incumbent*
34 *monopolist can induce customers to sign long-term*
35 *contracts, with substantial penalties for breaching the*
36 *contract. These contracts can act as a barrier to entry, if*
37 *they prevent customers from switching to an entrant."*
38

1 The TRA's Hearing Officer's report does not
2 directly address termination liability per se.
3 The Report and Recommendation of the Hearing
4 Officer in TRA Docket No. 00-00702 states at
5 page 8 lines 4-6:
6
7

8 *"...when special rates and terms are reached through*
9 *negotiation between a public utility and a business*
10 *customer such[rates and terms] shall be presumed valid*
11 *and shall not constitute price discrimination."*
12

13 The TRA Hearing Officer's report looked to
14 price discrimination as the central issue
15 determining validity of terms reached through
16 negotiation.
17

18 An indirect effect of the price discrimination
19 policy is to treat as valid an economic
20 condition (the incumbent's termination charges)
21 which the FCC treats as a potential threat to
22 the incumbent's competitors. The FCC speaks to
23 "induce[ments]," and the report speaks to
24 "negotiation." Thus, plain readings of the
25 FCC's order and the Hearing Officer's report
26 yield very different opinions on termination
27 liability.
28

29 Ms. Blake does not acknowledge the difference
30 and represents the CAPD's direct testimony as
31 "no new angle," as if the FCC's policy has
32 already been accounted for by the TRA's Hearing
33 Officer's report:
34

35 *"Dr. Brown neglects to mention the [early termination*
36 *charges]...have been limited by tariff and approved by*
37 *the Authority" [Blake page 25 lines 15-16]."*

1 Ms. Blake's rebuttal testimony does not address
2 the economic issue raised by the FCC: Does the
3 incumbent's termination charge prevent its
4 customers from becoming customers of the CLECs
5 when it serves the customers' interests?
6

7 Ms. Blake's rebuttal testimony ignores the
8 FCC's policy and gives ascendancy to the policy
9 recommended by the TRA Hearing Officer. But
10 elsewhere in her testimony, where she rebuts
11 the direct testimony of CompSouth's witness Mr.
12 Joseph Gillan, Ms. Blake's subordinates the
13 state agency's authority to the FCC's:
14

15 *"There is no question that the Tennessee Legislature*
16 *passed landmark legislation, opening the local exchange*
17 *markets in Tennessee to competition. However, Section*
18 *251(d)(2) puts limits on a state's ability to make*
19 *determinations about unbundling that are inconsistent*
20 *with those made by the Federal Communications*
21 *Commission ("FCC")... There is no question that the*
22 *FCC's framework for finding market-by-market non-*
23 *impairment for mass-market switching is an integral part*
24 *of the federal regime and any state decision regarding*
25 *the local circuit switching impairment issue must be*
26 *consistent with that federal regime. Mr. Gillan's*
27 *testimony is flatly contrary to the FCC's discussion of*
28 *state authority in the Triennial Review Order [Blake*
29 *Rebuttal pages 3 lines 1-5 and page 4, lines 5-9]"*
30

31 Ms. Blake invokes the primacy of federal
32 regulatory authority on an arbitrary basis,
33 arguing that a state agency cannot "make
34 determinations about unbundling that are
35 inconsistent with those made by the" FCC while
36 turning to the TRA Hearing Officer's report to
37 preserve the economic validity of the
38 incumbent's termination charge.

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Q_12. Do you know of any TRA proceeding where the TRA has had the opportunity to consider the differences between the FCC's policy on the termination liability and TRA Hearing Officer's recommended policy?

A_12. No. I am not aware of any other TRA proceeding where the TRA has had the opportunity to consider the differences between the FCC's policy and TRA Hearing Officer's recommended policy. This is the first proceeding affording such an opportunity to the TRA.

III. B. - Incumbent Does Not Offer Evidence Contradicting CAPD's Evidence

Q_13. What evidence have you offered in the CAPD's direct testimony to prove that the incumbent's termination charges prevent its customers from switching to the CLEC?

A_13. I offered specific evidence affirming that the incumbent's termination charges prevent its customers from switching to the CLEC.

For example, in the direct testimony, starting at page 37 line 12, I testified:

"Q_52. What is the basis for your opinion that the termination charges have no have no economic foundation?"

1 *" A_52.....Once the customer stops taking service from*
2 *one supplier, the customer is no longer a source of profit*
3 *and cost.*

4
5 *"To the extent the termination charges force the*
6 *customer to repay the incumbent's discount or price*
7 *reduction, the charges recapture the incumbent's*
8 *foregone profits and represent the continuation of profits*
9 *established in a monopoly environment, rather than*
10 *profit in a competitive market, and the customer is the*
11 *source of those monopoly profits in the event a customer*
12 *switches service to a CLEC..."*

13
14 In my direct testimony, beginning at page 40
15 line 29, I testified:

16
17 *"Q_57. In your opinion, would a mass market customer*
18 *switch service to a CLEC utilizing UNEs if the CLEC*
19 *were a lower cost supplier than the incumbent and if the*
20 *customer had to pay termination fees to the incumbent?"*

21
22 *"A_57. No. In my opinion, a mass market customer*
23 *would not pay termination fees to the incumbent and thus*
24 *would not switch to the CLEC. By paying the termination*
25 *charges, the customer loses the economic benefits of the*
26 *incumbent's price reduction, as if it had never occurred,*
27 *as if a CLEC had not been present until the day of the*
28 *breach."*

29
30 *"Q_58. How do you know this particular economic*
31 *evaluation is actually made by the customer?"*

32
33 *"A_58. One way to make that evaluation is to consider*
34 *the commercial history of long-term contracts in*
35 *Tennessee."*
36

1 *"For example, since 1998 the incumbent has secured*
2 *approximately 1000 long-term contracts with customers*
3 *in Tennessee...*

4
5 *"However, there is no public record that I know which*
6 *indicates how many, if any, of these customers have*
7 *breached, or if they have breached, there is nothing in*
8 *the public record indicating what they paid in*
9 *termination charges and when the charges were paid."*

10
11 *"Q_59. Isn't it true that the termination charges are*
12 *triggered when the CLEC is a lower cost supplier than*
13 *the incumbent?"*

14
15 *"A_59. Yes, it is certainly true..."*
16
17

18 **Q_14.** **In your opinion, does Ms. Blake's rebuttal**
19 **testimony offer evidence which contradicts the**
20 **evidence in your direct testimony?**

21
22 **A_14.** No. In my opinion, Ms. Blake has not offered
23 rebuttal evidence to contradict the evidence in
24 my direct testimony. Ms. Blake adds nothing to
25 the public record to show that the incumbent's
26 customers are breaching contracts and paying
27 termination fees to switch service to a CLEC.
28 Therefore, the incumbent's termination charges
29 are doing exactly what the FCC warned of:
30 preventing the incumbent's customers from
31 serving their own economic interests by
32 switching their service to the CLEC.

33
34 Rather than providing evidence to contradict
35 what the CAPD has placed in the record, Ms.
36 Blake dismisses the CAPD's direct testimony by
37 portraying it in three misleading ways:
38

ITEM 1. Ms. Blake testifies that the CAPD argues that the incumbent's term contracts impair the CLECs:

"Dr. Brown cites nothing whatsoever from the TRO that suggests that the use of term contracts has any relevance to this proceeding. [Blake rebuttal, page 29, lines 13-15]...Inhibiting term contracts in a misguided attempt to assist CLECs helps neither genuine competition nor customers.[Blake rebuttal, page 33, lines 16-17]..."

RESPONSE TO ITEM 1. Term contracts are not the focus of the CAPD's direct testimony. The CAPD focuses on and testifies to the economic invalidity of termination liability in the incumbent's tariffs and contracts:

"The FCC's rules regarding the 1996 Telecommunications Act have been followed by an incumbent-response composed of special tariffs, promotions, and contracts which lower the incumbent's prices to its current and new customers. Termination charges are a fundamental feature of the commercial instruments used by the incumbent to respond to competitive pressure in the mass market [Direct, page 6 line 9.]"

The CAPD testified that the customer loses the benefits of the incumbent's price reduction if the customer switches its service to a CLEC:

"By including termination charges in its offerings, the incumbent offers economic benefits that can be withdrawn from the customer if it were to switch to a CLEC [Direct, page 6 line 19.]"

1 The CAPD testified that the incumbent's
2 strategy is to maintain its ability to apply
3 termination charges in Tennessee:
4

5 *"Equally important, termination charges could be*
6 *employed in any of the incumbent's future tariffs, once a*
7 *regulatory decision commits the CLEC to UNE-L entry of*
8 *the mass market [Direct, page 30 line 27]."*
9

10 The CAPD further testified that the incumbent's
11 termination fees do not represent the
12 incumbent's costs but represent an imposition
13 of the incumbent's monopoly profits on the
14 customer if it switches to a CLEC:
15

16 *"To the extent the termination charges force the*
17 *customer to repay the incumbent's price reductions, the*
18 *charges capture foregone profits and represent the*
19 *continuation of profits established in a monopoly*
20 *environment, rather than profit in a competitive market,*
21 *and the customer is the source of those monopoly profits*
22 *in the event a customer switches service to a CLEC*
23 *[Direct, page 7 line 27]."*
24

25 Ms. Blake does not deny that BellSouth's
26 termination charges are a recovery of monopoly
27 profit from a customer who switches its service
28 to a CLEC. Ms. Blake does not assert that
29 BellSouth's termination charges represent cost
30 recovery. Ms. Blake does not deny that
31 BellSouth's termination charges apply when the
32 CLEC is the customer's lower-cost service
33 provider. Ms. Blake does not deny that the
34 customer's benefits are lost if it switches
35 from BellSouth to the CLEC. Ms. Blake is silent
36 regarding the evidence in my direct testimony
37 where BellSouth's counsel told the TRA:
38

1 *"If on the other hand the customer chooses to terminate*
2 *early, you know, it seems reasonable and consistent with*
3 *past practice and past tariffs that BellSouth would be*
4 *able to recover that past discount that it gave to the*
5 *customer... [Direct, page 36 line 28.]"*

6
7
8 ITEM 2. Ms. Blake testifies that termination
9 liability delays but does not prevent a CLEC's
10 market entry, that the proper economic
11 interpretation of delay is a cost increase to
12 the CLEC, that termination liability is an
13 increase of the CLECs' costs, that a cost
14 increase is acceptable to the courts and the
15 FCC, and that a cost increase is only one side
16 of an impairment analysis:

17
18 *"...the efficient CLEC may choose to wait for a*
19 *particular customer's contract to reach its end As I*
20 *noted, the CLEC may chose to ignore that particular*
21 *customer, and instead market to the other 99 percent of*
22 *customers not currently under term contracts. Or, as I*
23 *also noted, the CLEC can simply wait until the contract*
24 *expires for that customer. Thus, at most, this example*
25 *describes a delay in the CLEC's service to a potential*
26 *new customer, which would mean that the potential for*
27 *revenues from these particular customers are pushed out*
28 *into the future somewhat.[Blake rebuttal, page 31, lines*
29 *22-23, page 31, lines 4-10]"*
30

1 *"Dr. Brown... adopts a definition of 'impairment' based*
2 *on CLEC cost disadvantage that was specifically rejected*
3 *by the U.S. Supreme Court [Blake rebuttal, page 25, lines*
4 *19-21] ...Definitions of 'impairment' that are based*
5 *merely on cost increases, without full consideration of*
6 *countervailing benefits have been rejected by the FCC*
7 *[Blake rebuttal, page 29, lines 9-11]... Dr. Brown does*
8 *not state whether he would make his claims after*
9 *considering the totality of revenues, costs, and*
10 *countervailing advantages...[Blake rebuttal, page 29,*
11 *lines 5-7]."*
12

13 RESPONSE TO ITEM 2. Ms. Blake does not indicate
14 how long of a delay an "efficient" CLEC can
15 tolerate nor how much of a cost increase an
16 "efficient" CLEC can withstand.
17

18 Ms. Blake testifies that the incumbent's
19 contracts push the CLEC's "potential...
20 revenues...into the future somewhat" but
21 provides no measure of the delay. Assuming for
22 the sake of argument that all contracts
23 represent the mass market, as Ms. Blake assumes
24 in her rebuttal at page 26 line 12, recent
25 filings by the incumbent and accepted by the
26 TRA indicate the delay is long. The incumbent's
27 contract TN03-2629-03 filed with the TRA on
28 February 25, 2004 has a term of 120 months. The
29 incumbent's contract GA99-0244-10 filed with
30 the TRA on January 13, 2004 has a term of 99
31 months. Clearly the incumbent's current
32 practice is to have very long term contracts.
33 Thus the CLECs' "future somewhat" approximates
34 a decade.
35

1 Eight-year and ten-year contracts are not the
2 only way for the incumbent to prevent revenues
3 from reaching the CLECs. The incumbent can
4 create costs for the CLEC that have the same
5 effect as delay. But how much of a cost
6 increase is required to create a barrier to
7 competition? Not much according to the FCC. In
8 the direct testimony I quoted the FCC's
9 language: "low levels of revenue... create
10 tight profit margins [and]...force service
11 providers to keep...customer costs at a
12 minimum." Ms. Blake testifies that BellSouth's
13 termination fees *"have been limited by tariff
14 and approved by the Authority,"* but my rebuttal
15 testimony, pages 10-12, shows that those limits
16 raise the CLECs' per-customer acquisition costs
17 by as much as 67 percent and by an average of
18 38 percent.

19
20 Ms. Blake's testimony suggests the "efficient"
21 CLEC will bear up to any hardship and keep
22 going and going as a competitor to BellSouth,
23 regardless of wait-time for new customers and
24 regardless of the increase in the CLECs'
25 customer acquisition costs. But it would not be
26 surprising for the CLECs to wither away in
27 Tennessee, their economic vitality stunted by a
28 lack of revenue and a lack of customers who
29 have been diverted from the CLEC by the
30 incumbent's termination charges.

31
32
33 ITEM 3. Ms. Blake testifies that because very
34 few customers are involved, the incumbent's
35 termination charges are not an issue:
36

1 *"Even assuming for the sake of argument that all of the*
2 *mass-market customers who signed up for term*
3 *agreements in 1998 still remain on some sort of term*
4 *agreement (which is obviously not the case) and further*
5 *assuming for the sake of argument that all 1,000*
6 *contracts apply to 3-line customers, there would be at*
7 *most only 0.14 percent of mass-market customers are*
8 *under term contracts. [Blake rebuttal, page 26, lines 12-*
9 *16]... the very small minority of customers with term*
10 *contracts can be expected to be rolling off their contracts*
11 *at various times... [Blake rebuttal, page 26, lines 20-*
12 *21]..."*

13
14 RESPONSE TO ITEM 3. There are 2.5 million mass
15 market customers in Tennessee, but there are no
16 TRA rules preventing the incumbent from
17 offering tariffs with termination liability to
18 any or all 2.5 million customers. My Exhibit
19 CAPD-SB Surrebuttal Testimony, Schedule 1,
20 pages 1 and 2, is a copy of the incumbent's
21 advertising letter for a package of services
22 being offered through March 31, 2004 to mass
23 market customers who do not currently purchase
24 all of their service from the incumbent. Page 1
25 is the letter, and page 2 is a list of terms
26 and conditions. A termination fee of \$240,
27 prorated, applies to any customer who signs up
28 for the service and then seeks an exit before
29 the term is reached.

30
31 This marketing effort is further evidence that
32 termination charges are a fundamental feature
33 of the commercial instruments used by the
34 incumbent to respond to competitive pressure in
35 the mass market.

36
37 In the direct testimony at page 30, beginning
38 at line 18, I testified:

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CAPD SURREBUTTAL- SB

1
2 *"Q_41. What evidence do you rely on to support your*
3 *conclusion that CLECs are impaired with regard to*
4 *accessing mass market customers through the UNE-L*
5 *platform?"*

6
7 *"A_41. I rely on Exhibit CAPD-SB Schedule 3, pages 1*
8 *– 3. Page 1 of 3 is a list of BellSouth's current and recent*
9 *tariffs where the mass market customer was or is liable*
10 *for a termination charge. The list shows that termination*
11 *charges have applied to the residential and business*
12 *customers. Equally important, termination charges could*
13 *be employed in any of the incumbent's future promotions,*
14 *once a regulatory decision commits the CLEC to UNE-L*
15 *entry of the mass market."*

16
17 The schedule I referred to in my direct
18 testimony, Exhibit CAPD-SB Schedule 3,
19 page 1, lists over 40 of the incumbent's
20 tariffs where termination charges apply.
21 Those tariffs, just like the incumbent's
22 current package I have referred to, can be
23 applied to any of the 2.5 million mass-
24 market customers in Tennessee.

25
26 **IV. Ms. Blake's Testimony That CAPD's**
27 **Opinion Will Cause Harm To**
28 **Tennessee's Consumers Is Wrong**

29
30
31 Q_15. If the TRA accepted and acted upon the opinions
32 expressed by the CAPD in its direct testimony,
33 what would be the effect on Tennessee's
34 consumers, according to Ms. Blake's rebuttal
35 testimony?
36

1 **A_15.** According to Ms. Blake's rebuttal testimony,
2 Tennessee's consumers would be harmed if the
3 TRA accepted and acted upon the CAPD's opinion.
4 In her rebuttal testimony at page 27 lines 5-11
5 Ms. Blake testifies:

6
7 *"Eliminating term contracts for these mass-market*
8 *customers may...rais[e] the prices to, and thereby harm...*
9 *mass-market...customers in Tennessee.... The goals*
10 *expressed in the Telecommunications Act's long title are*
11 *'To promote competition and reduce regulation in order*
12 *to secure lower prices'"*
13

14 **Q_16.** **What is your opinion of Ms. Blake's claim of**
15 **harm?**

16
17 **A_16.** In my opinion Ms. Blake does not support her
18 claim. It is a misconstruing of the CAPD's
19 testimony.

20
21 There is no direct or implied proposal in the
22 CAPD's testimony to eliminate term contracts.
23 Ms. Blake represents the CAPD's opinion as
24 equivalent to eliminating term contracts, even
25 though CAPD's opinion is based on the FCC's
26 policy towards termination charges.

27
28 Despite the central point of Ms. Blake's
29 rebuttal testimony, that the CLECs in Tennessee
30 are not impaired, her warning that BellSouth
31 will raise its prices shows that she does not
32 worry that competitive pressure from the CLECs
33 will restrain BellSouth from unilaterally
34 raising its prices to Tennessee's consumers.

35
36 But how can the incumbent unilaterally raise
37 prices in a competitive market like
38 Tennessee's? Ms. Blake's warning of a price

1 increase for Tennessee's consumers contradicts
2 her rebuttal testimony at page 6 lines 3-7:
3

4 *"Under a finding of no impairment [by the TRA], there*
5 *are sufficient alternatives in the market such that CLECs*
6 *do not need to rely on ILEC services at regulated prices.*
7 *Because CLECs have alternatives, competition will drive*
8 *the market price of the network element. As such, it is*
9 *appropriate for BellSouth to set its rate according to*
10 *those market conditions through negotiations with the*
11 *CLEC."*
12

13 If CLECs can buy network elements from
14 BellSouth at prices set through the operation
15 of a competitive market, then the same
16 competitive market would prevent Tennessee's
17 prices from rising if BellSouth's term
18 contracts were eliminated; thus, Tennessee's
19 consumers would benefit from the elimination
20 of BellSouth's term contracts, as shown by the
21 paraphrasing of Ms. Blake's testimony to apply
22 it to term contracts:
23

24 *"If term contracts are eliminated[by the TRA], there are*
25 *sufficient alternatives in the market such that Tennessee*
26 *consumers do not need to rely on the incumbent's term*
27 *contracts. Because Tennessee consumers have*
28 *alternatives, competition will drive down the market*
29 *price of service. As such, it is appropriate for the TRA to*
30 *eliminate term contracts so Tennessee consumers get the*
31 *best price they can, moving freely from the incumbent to*
32 *the CLEC as market conditions direct."*
33
34

A side-by-side comparison more easily shows how Ms. Blake's logic applies to term contracts:

Ms. Blake's testimony on the competitive pricing of network elements:	Paraphrasing Ms. Blake's testimony and applying it to the incumbent's contracts:
Under a finding of no impairment <u>[by the TRA]</u> , there are sufficient <u>alternatives in the market such that CLECs do not need to rely on ILEC services at regulated prices. Because CLECs have alternatives, competition will drive the market price of the network element. As such, it is appropriate for BellSouth to set its rate according to those market conditions through negotiations with the CLEC.</u>	If term contracts are eliminated <u>[by the TRA]</u> , there are sufficient <u>alternatives in the market such that Tennessee consumers do not need to rely on the incumbent's term contracts. Because Tennessee consumers have alternatives, competition will drive down the market price of service. As such, it is appropriate for the TRA to eliminate term contracts so Tennessee consumers get the best price they can, moving freely from the incumbent to the CLEC as market conditions direct.</u>

Both statements are right or both are wrong. One statement cannot be right while the other is wrong. But BellSouth wants to eat its cake and have it too, eliminating regulated prices for network elements but seeking regulatory protection of its termination fees.

The pervasiveness of those fees in Tennessee is further evidence that exceptional

1 circumstances exist in Tennessee impairing the
2 CLECs, as described by the FCC in para. 503 of
3 the TRO:
4

5 *“Exceptional Sources of Impairment. In exceptional*
6 *circumstances, states may identify specific markets that*
7 *facially satisfy the self-provisioning trigger, but in which*
8 *some significant barrier to entry exists such that service*
9 *to mass market customers is foreclosed even to carriers*
10 *that self-provision switches...Where the self-provisioning*
11 *trigger has been satisfied and the state commission*
12 *identifies an exceptional barrier to entry that prevents*
13 *further entry, the state commission may petition the*
14 *Commission for a waiver of the application of the*
15 *trigger, to last until the impairment to deployment*
16 *identified by the state no longer exists.”*
17

18 Ms. Blake testifies that any contract, long-
19 term or otherwise “reflect[s] a quid pro quo
20 where buyer and seller are made better off by
21 the exchange[Blake rebuttal, page 33 line
22 16].” But that is not always true.
23

24 The link between individual decisions and their
25 aggregate impact on the market was analyzed in
26 *The Tyranny of Small Decisions*, an essay
27 written in 1966 by Alfred E. Kahn, a long
28 recognized expert in regulation, the dean of
29 expert regulatory witnesses for the incumbent
30 telephone companies, the former head of the
31 Civil Aeronautics Board, and a professor
32 emeritus at Cornell University.
33

34 Khan wrote:
35

1 *"A market economy makes its major allocations*
2 *decisions on the basis of a host of 'smaller'*
3 *decisions...[but] the consumer can be victimized by the*
4 *narrowness of the context in which he exercises his*
5 *sovereignty...if enough people vote for X, each time*
6 *necessarily on the assumption that Y will continue, Y*
7 *may, in fact, disappear...a genuine deprivation that*
8 *customers might willingly have paid something to avoid."*
9

10
11 Ms. Blake testifies that "Dr. Brown does not
12 state whether he would make his claims after
13 considering the totality of revenues, costs,
14 and countervailing advantages." I give the same
15 testimony again because the CLECs have no
16 "totality of revenues and countervailing
17 advantages" for customers bound by the
18 incumbent's termination liability.
19

20 This concludes my surrebuttal testimony.
21

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Docket No. 03-00491
Exhibit CAPD-SB_____
Surrebuttal Testimony_____
Schedule 1_____
Page 1 of 2_____

Dear _____

Why use multiple companies for your communications needs when you can get it all from BellSouth? Only BellSouth Answers offers you all the services you need on one bill — local, long distance, Internet, and Cingular® Wireless — plus cash back for each new qualifying service you select. With BellSouth Answers it's easy to simplify your life and you'll enjoy extra savings, too.

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Sincerely,

Pam Jones

Pam Jones
Vice President, Consumer Marketing

P.S. BellSouth has the services you need and we can customize a bundle to fit your lifestyle. The more new qualifying services you add to your bundle, the more cash back you'll receive. To find out more, see our enclosed brochure or call 1.866.848.0228.

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*Customers who bill FastAccess service to phone line with BellSouth Unlimited plan receive \$10 monthly savings, and customers who bill FastAccess service to phone line with BellSouth Complete Choice plan without the Unlimited plan receive \$5 monthly savings. The regular monthly price for FastAccess DSL Lite is \$39.95. FastAccess DSL is \$49.95. Prices in some states require BellSouth retail voice line. Only one discount per phone line. Please see back of letter for other important terms and conditions.

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415.00 in excess of \$100,000 for each purchased equipment.

Back coupons in this offer, customer must be a new or existing Complete Choice plan customer and become a new subscriber to the other qualifying service (Internet Service, BellSouth Southcast, DSL or Cellular Wireless). Offer excludes existing qualifying services moved to a new service address. Offer may not be combined with other promotions. Limit one offer per customer. Offer period 1/5/04 - 3/31/04.

Call South Unlimited plan is for domestic residential use only and only available to Complete Close plan customers. Not available to customers with Variable Call Forwarding. Preferred Call Forwarding or Remote Access to Call Forwarding features on local line. Calls must be placed 1-800 code and terminate carrier. To check under the Unlimited plan customer's account for required additional qualifications.

Offers available to new residential customers only. BellSouth Long Distance, Inc. includes fax, toll-free and inter-AFA toll calls periods in which their subscribers to Nickel Value plans. Promotion applies to domestic call charges only and only to new customers of BellSouth Long Distance, Inc. who are eligible for its South Long Distance. Promotion expires 3/31/04. Taxes, fees and other charges. Offers available to new residential customers only. BellSouth Long Distance, Inc. includes fax, toll-free and inter-AFA toll calls periods in which their subscribers to Nickel Value plans. Promotion applies to domestic call charges only and only to new customers of BellSouth Long Distance, Inc. who are eligible for its South Long Distance. Promotion expires 3/31/04. Taxes, fees and other charges.

Additional Services: Customers who buy Dial Internet Service to share line with DSL service will receive additional services such as HomeNetworking Plus at no extra charge. Free month(s) of service will be credited on customer's bill for the 1st & 3rd months of DialNet service. Charges for other additional services will be added to customer's bill for the 1st & 3rd months of DialNet service. Charges for charges will be added to only reward or rebate. See coupons for other details. The following table shows the charges will apply in the event of early termination. Activation/modem fee & 6 months @ \$100 of rebate.

[illegible][illegible]

Complete Choice vs. **Complete Choice Plus**. Savings will vary by plan. Complete Choice Plus includes all features of Complete Choice, plus additional savings opportunities.

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CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2004, a true and exact copy of the enclosed document was served via First-Class U.S.Mail, Postage-PrePaid or electronic mail on the following parties of record:

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